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September 14, 2017

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On September 12, 2017, Thomas Larsen (Mediacom), Danny Jobe (MetroCast), Ed McKay (Shentel), Ross Lieberman (American Cable Association ("ACA")), and Thomas Cohen and J. Bradford Currier (Kelley Drye & Warren LLP, Counsel to ACA) met with the following staff of the Federal Communications Commission ("Commission") to discuss ACA's comments filed in the above-referenced docket[1] and its proposals to address barriers in obtaining access to poles pursuant to Section 224 of the Communications Act[2]:

- Jay Schwarz, Wireline Legal Advisor to Chairman Pai
- Claude Aiken, Wireline Legal Advisor to Commissioner Clyburn

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1 *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017). *See* Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84 (June 15, 2017); Reply Comments of the American Cable Association on the Notices of Proposed Rulemaking, WC Docket No. 17-84 (July 17, 2017).

2 47 U.S.C. § 224.

- Amy Bender, Wireline Legal Advisor to Commissioner O'Rielly
- Travis Litman, Wireline Legal Advisor to Commissioner Rosenworcel
- Nathan Eagan, Acting Wireline Legal Advisor to Commissioner Carr
- Michael Ray and Adam Copeland, Wireline Competition Bureau

The three ACA members opened each meeting by explaining that each is investing substantial amounts to upgrade and extend their networks, including in rural communities and less dense areas, and how obtaining expeditious and reasonable access to poles is critical to the success of these deployments. They added that they have good working relationships with pole owners in most instances, but with some pole owners, it takes too long to attach and costs too much. With these owners, they are often forced to delay projects, making their customers dissatisfied or even losing them to other network providers, some of whom are the pole owners. In other instances, they have opted to install facilities underground, which, because of the added cost, has reduced the amount of facilities they are able to deploy. They therefore thanked the Commission for initiating this proceeding and urged the Commission to act as soon as possible.

Mr. Lieberman then explained that the concerns of ACA's members are less about reducing the amount of time that pole owners have to complete each of their steps in the timeline and more about addressing the underlying root causes that prevent parties from meeting existing timelines, as well as about eliminating excessive charges for preparing for and making attachments. He added that the Commission should use this proceeding to address these concerns. ACA's recommendations thus focus on clarifying rights and obligations, and adopting measures to increase transparency and cooperation among pole owners, existing attachers, and new attachers. That way attachments are facilitated, disputes are reduced, and parties do not need to escalate matters by filing complaints. ACA's proposals further recognize the legitimate and important safety and reliability concerns of electric utilities and their regulators and the concerns of existing attachers that the integrity of their attachments be preserved.

ACA representatives then reviewed the following issues and proposals:

ACA's Key Issues and Proposals:

Eliminate the Need to File Pole Attachment Applications for Certain Attachments

Mr. Lieberman began by recommending that the Commission clarify that attachers should not be required to undergo the full pole attachment application process in instances where there are significant benefits to expeditious access, minimal opportunities to harm pole safety and reliability, and ready and well-known measures to audit attachments and correct issues. For example, although the Commission determined over 15 years ago that applications for

overlashing to existing facilities are unnecessary,[3] ACA members reported that many pole owners still require attachers to file applications before overlashing. Mr. Jobe discussed how one pole owner permitted overlashing without an application, but only up to an arbitrary number of spans (*e.g.*, ten). Otherwise, the pole owner required the attacher to undergo the full permitting process, which delayed overlashing by 30 to 45 days.[4] Mr. McKay stated that, even when pole owners allow overlashing without a prior application, they frequently require attachers to apply for post-attachment permits and pay associated fees. ACA therefore has recommended that the Commission adopt a "notify and attach" process, allowing attachers to overlash after providing 15 days' notice to the pole owner. Through a "notify and attach" process, the pole owner would have an opportunity to determine whether an attachment might harm pole safety or reliability during the notice period and, if so, address such issues prior to attachment. The pole owner also would be able to conduct a post-attachment audit to assess whether the overlashing was done properly, with the attacher responsible for any damages or further work necessitated by noncompliant attachments.

The ACA representatives also recommended that the Commission adopt an "attach and notify" process for the installation of customer drops. Mr. Lieberman stated that, while many pole owners allow attachers to install drops so long as they receive subsequent notice, some pole owners require attachers to undergo the full application process before allowing drops. ACA members explained that such delays result in attachers losing customers who cannot wait for the full application process to run its course. These delays also may prevent providers from meeting franchise requirements to deliver service within specified timeframes. Mr. Larsen noted that customer drops do not add significant load to the pole and therefore do not present a significant safety risk. As with overlashing, Mr. McKay indicated that pole owners regularly charge post-attachment permitting fees even when they do not require applications to install drops. Mr. McKay further stated that pole owners often differ on what constitutes an acceptable drop and may prevent attachers from installing a drop that requires multiple pole "touches." Establishing an "attach and notify" process would allow attachers to reach new customers quickly and safely, while ensuring pole owners retain the ability to inspect drops and hold attachers liable for noncompliant attachments.

Finally, ACA representatives recommended a "notify and attach" process for routine line extensions involving a limited number of poles. Such extensions by existing attachers often are necessary to serve a specific customer, building, or small group of locations. As a result, the

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3 *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (2001).

4 Mr. Larsen stated that such unnecessary application procedures could impact the deployment of strand-mounted attachments for Wi-Fi hotspots, unnecessarily impeding broadband availability in underserved areas.

attacher has an immediate need to provide service, especially in areas where robust competition exists. However, Mr. McKay indicated that pole owners frequently require these short line extensions to go through the complete application process, which leads to reviews that are unnecessarily lengthy and costly. He noted this is a particular problem when the pole owner is the incumbent telephone company and competes for the same customers as the attacher.

Expedite the Processing of Applications

Where pole attachment applications are necessary, ACA representatives discussed actions the Commission should take to facilitate attachments while ensuring that pole owners can protect the safety and reliability of their assets. ACA representatives emphasized that just shortening pole attachment timeframes will do little to spur deployment if pole owners and existing attachers continue to ignore their regulatory obligations.

First, Mr. Lieberman explained that pole owners can take weeks to respond to the submission of an application. Furthermore, because pole owners are not transparent about telling applicants all information that is required to be included on applications at the time of their submission, owners can often request that additional information be submitted with impunity. Mr. Lieberman stated that pole owners rarely, if ever, inform attachers whether they formally accept an application as complete, thereby avoiding the trigger for the start of the Commission's pole attachment timeframes. The lack of a formal application acceptance undermines attacher complaints against pole owners for unreasonable pole access delays. Mr. McKay indicated that pole owners rarely provide application status updates unless specifically asked (and typically not in writing), highlighting one application covering 30 poles that remains pending without any explanation from the pole owner since December 2016.[5] Mr. McKay reported instances where pole owners requested additional information not included in the application instructions or returned applications as incomplete for minor issues. Mr. Jobe similarly discussed how pole owners demanded resubmission of attachment applications in order to avoid triggering the Commission's timeframes. Mr. Larsen stated that pole owner responsiveness to applications often depends on local relationships between the attacher and the pole owner, and that his company encounters significant delays when a pole owner "outsources" or otherwise centralizes its application review process. Such centralization leaves attachers in the dark as to the current status of their applications.[6] Mr. McKay, Mr. Jobe, and Mr. Larsen all agreed that application delays resulted in attachers abandoning deployments or incurring additional expenses to deploy

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[5] Mr. Jobe similarly reported that his company never receives formal acknowledgements that its applications are complete from pole owners and that application response timeframes vary considerably among pole owners.

[6] To address this issue ACA recommends that pole owners should provide a web-based ticket management system to track the entire attachment process, which all attachers would be required to use.

underground.[7] ACA representatives therefore recommended that applicants should only be required to provide information on a pole owner's applications that is specified in a master service agreement or in publicly-released requirements at the time of the application's submittal. Moreover, a pole attachment application should be deemed complete seven days after its submission, unless the pole owner notifies the applicant that the application is incomplete and enumerates all reasons for finding it incomplete. Any resubmitted application need only address the pole owner's enumerated reasons and should be deemed complete within three days after resubmission unless the pole owner specifies which enumerated reasons were not addressed.

Second, ACA representatives recommended that the Commission require pole owners to develop electronic databases of relevant pole information and make such information available to attachers upon request, subject to confidentiality and security requirements. ACA representatives explained that pole owners regularly request information about existing attachers during the application process that new attachers do not possess. Mr. Jobe stated that this often results in new attachers being forced to conduct full engineering analyses not only on their proposed attachment, but also on all existing attachments. Mr. McKay stated that, despite the cost and effort put into these analyses, pole owners do not appear to retain such information and instead demand that each new attacher conduct a comprehensive pole review. Consequently, ACA representatives suggested that pole owners be required to retain prior pole analyses to assist in subsequent applications and update their pole attachment databases each time they "touch" a pole.

Third, ACA representatives recommended that the Commission prohibit pole owners from charging for unnecessary engineering design or pole loading analyses. Mr. Larsen stated that pole owners often require special engineering analyses for even standard pole attachments. Mr. Larsen highlighted how one pole owner demanded wind and other special engineering analyses for every pole of a 100-pole buildout, with the analyses conducted by a third party chosen by the pole owner.[8] Mr. McKay indicated that his company sometimes must pay not only for engineering analyses for the pole owner, but also for existing attachers. Making matters worse, the pole owner often requires that the existing attacher engineering analysis be completed before starting its analysis. This "step-wise" process leads to unnecessary delays and duplicative costs borne by the new attacher. While ACA and its members recognize pole owners' interest in maintaining the safety and reliability of their poles, the Commission should adopt a presumption

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[7] Mr. McKay stated that his company regularly prepares engineering analyses for both pole and underground deployments due to repeated application processing delays. Such analyses result in duplicative costs that reduce resources available for other deployments.

[8] The initial estimates Mr. Larsen's company received to complete analysis were approximately $100,000.

that requiring a pole loading analysis or engineering design for *every* pole in an application as a matter of course is prohibited.

ACA representatives also recommended that the Commission require pole owners to provide attachers with the option to conduct joint pole surveys, which would enable pole owners and attachers to rapidly determine what make-ready work is necessary on a pole.[9] Mr. McKay, Mr. Jobe, and Mr. Larsen all stated that joint pole surveys resulted in attachers and pole owners working cooperatively to determine the make-ready work that is needed, thereby avoiding disputes.

Improve the Effectiveness of the Make-Ready "Self-Help" Remedy

Mr. Lieberman acknowledged the benefits of the "self-help" remedy the Commission adopted in 2011, which permits new attachers to complete make-ready in the communications space when existing attachers fail to act within the Commission's 60-day timeframe.[10] However, Mr. Lieberman explained that attachers face significant obstacles when invoking this right, allowing uncooperative pole owners and existing attachers to proceed according to their own timetables without penalty. Mr. McKay indicated that even where they fail to undertake make-ready, certain pole owners or existing attachers threaten litigation or attempt to deny attachers pole access to conduct make-ready work. ACA representatives also discussed how pole owners generally fail to provide lists of approved contractors to undertake make-ready work at a reasonable price, despite their obligation to provide such information. ACA representatives further noted that the self-help remedy does not extend to work in the electric space, with Mr. McKay stating that his company regularly encounters resistance from electric utilities in completing make-ready work despite offers to pay associated labor costs.

ACA representatives recommended that the Commission improve the effectiveness of the self-help remedy by providing greater clarity on the relative rights and responsibilities of each party. Specifically, the Commission should clarify that if existing attachers fail to complete make-ready within the Commission's 60-day timeframe, the new attacher has an enforceable right to undertake all necessary make-ready using its own contractor, including work in the electric space. The new attacher would be required to provide reasonable notice to existing attachers so they can be present while the work is performed and would remain liable for any damages caused by faulty make-ready work. The Commission also should eliminate the 15-day period for utilities to undertake make-ready at the end of the 60-day period, as ACA

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9 Utilities should provide notice to all attachers at least three days before it conducts the survey.

10 *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5265, para. 49 (2011).

representatives reported that utilities generally have no interest in handling such work. Mr. Larsen noted that because pole owners retain ultimate responsibility for ensuring pole safety, they should within a defined period of time certify the compliance of existing attachments after any work is done on their poles, and not be able to assess fines on existing attachers for noncompliance years later.

Ensure Make-Ready Charges are Just and Reasonable

ACA representatives discussed how the Commission can take action to improve transparency and reduce the charges associated with make-ready work. Mr. Lieberman stated that pole owners repeatedly charged ACA members for work unrelated to new attachments and sent vague, un-itemized estimates of make-ready costs as well as final make-ready invoices that not only were un-itemized, but far exceeded initial estimates. The lack of detail regarding make-ready costs means that attachers often lack the information necessary to challenge unreasonable make-ready charges. Mr. Larsen and Mr. Jobe indicated that pole owners included costs to resolve preexisting violations and replace aging poles in their make-ready estimates, even though attachers already pay for pole maintenance through pole rental fees. Mr. McKay stated that his company was charged for the replacement of a 75-year old pole. Mr. Larsen also reported receiving invoices for make-ready costs months after project completion that exceeded initial estimates by thousands of dollars. They added that if their charges were known upfront, they would have chosen to install facilities underground. By contrast, ACA representatives discussed how some pole owners provide schedules of common make-ready charges, allowing attachers to accurately budget for deployments in advance and reducing billing disputes.[11] As a result, ACA representatives recommended that the Commission prohibit pole owners from charging for make-ready work unrelated to new attachments, including for work to fix existing violations or replace poles. The Commission also should require pole owners to provide attachers with make-ready cost estimates and final invoices with itemized details for work on a per-pole basis and with regular updates on whether the costs of ongoing make-ready work are consistent with estimates.[12]

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[11] ACA continues to recommend that the Commission also increase the timeliness and effectiveness of its pole attachment enforcement process by adopting its proposed 180-day shot clock for resolution of pole-related complaints filed with the Commission. ACA further recommends the Commission impose significant penalties on utilities found to have violated the pole attachment rules, including compensatory damages and legal fees.

[12] Enabling attachers to determine their buildout costs in advance is critical to ensuring small and rural broadband provider participation in the Commission's upcoming Connect America Fund Phase II auction. *See Comment Sought on Competitive Bidding Procedures and Certain Program Requirements for the Connect America Fund Phase II Auction (Auction 903)*, AU Docket No. 17-182, WC Docket No. 10-90, Public Notice, 32

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.[13]

Sincerely,

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FCC Rcd 6238 (2017). Without a clear understanding of potential buildout costs, broadband providers will be unable to accurately develop and modify their bidding strategies at auction.

13 47 C.F.R. § 1.1206.